

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR - 6 2004

In the Matter of)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Amendment of Section 1.17 of the
Commission's Rules Concerning Truthful
Statements to the Commission)

GC Docket No. 02-37

Amendment of the Commission's Rules
Regulations to Adopt Protection of the Due
Process Rights and Other Protections of
Title III Licensees in Connection With the
Exercise by the Commission and its Staff of
the Commission's Enforcement Powers and
Certain Licensing and Regulatory Functions)

RM-_____

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PETITION FOR LIMITED FURTHER RECONSIDERATION

James A. Kay, Jr. ("Kay"), by his attorney, and pursuant to Section 405 of the Communications Act, of 1934, as amended, 47 U.S.C. § 405, and Section 1.429 of the Commission's Rules and Regulations, 47 C.F.R. § 1.429, hereby petitions the Commission to reconsider the *Memorandum Opinion and Order* (FCC 04-65; released March 23, 2004) and the *Report and Order* (FCC 03-45; released March 10, 2003) in the captioned proceeding.

1. In the *Report and Order* the Commission, inter alia, denied Kay's above-captioned petition for rulemaking. In the *Memorandum Opinion and Order* the Commission denied Kay's timely petition for reconsideration of that action. Kay now presents this request for further reconsideration, limited to a single issue. In so limiting this further petition for reconsideration, however, Kay does not concede or abandon any of the other arguments and positions he previously advanced.

2. Among Kay's specific proposals was on that the Commission modify its regulations and/or practices so as to assure that applicants and licensees are afforded an opportunity for truly independent Commission review of adverse actions by delegated authority.

Petition for Rulemaking at p. 14. Kay specifically asked that the Commission end the common

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practice whereby the actual consideration and evaluation of applications for review, as well as the drafting of and recommendation to the Commission of dispositive orders, are in fact undertaken by the same personnel whose previous actions are ostensibly under review by the Commission. This was the last of ten specific proposals offered by Kay as a “Bill of Rights” for Title III licensees and applicants.

3. In the *Report and Order* the Commission offered no reasons for its summary rejection of all Kay’s proposals, including this one. In the *Memorandum Opinion and Order* the Commission goes through the motions of at least briefly restating each of Kay’s ten proposals, and it purports to specifically address the first five in as many sentences. *Memorandum Opinion and Order* at ¶ 8. The remaining five proposals, however, including the proposal to afford a truly independent review of delegated authority actions, are lumped together and brushed aside by the following dismissive statement: “Kay has advanced no compelling basis to overturn existing law and practice relevant to his remaining proposals, which involve settlements, burdens of proof, the processing of applications, and discovery. We believe that existing law and practice appropriately balance due process and other public interest considerations.” *Id.*

4. For purposes of this petition, Kay does not question, although he does not concede, the ruling insofar as it is within the scope of the Commission’s broad discretion. It is respectfully submitted, however, that as to Kay’s tenth proposal, the Commission is bound by its own enabling statute to independently review delegated authority actions upon proper request. Specifically, there is a statutory right, under Section 5(c)(4) of the Communications Act, to have actions taken by a delegated authority reviewed by the Commission, and the agency’s current practice with respect to applications for review violates that provision and denies that right.

5. Although Section 5(c)(1) of the Communications Act, provides that the Commission may delegate to its operating offices and bureaus the authority to take certain actions and issue certain orders, Sections 5(c)(4) states: “Any person aggrieved by any such

order, decision, report or action may file an application for review by the Commission ..., and every such application shall be passed upon by the Commission. 47 U.S.C. § 155(c)(4) (emphasis added). Section 405(a) provides for the submission of a “petition for reconsideration only to the authority making or taking the order, decision, report, or action.” 47 U.S.C. § 405(a) (emphasis added).

6. The Communications Act thus provides that a delegated authority will take dispositive action on petitions for reconsideration of actions by that delegated authority, that the Commission will take dispositive action on applications for review, and that the Commission (not a delegated authority) will take dispositive action on petitions for reconsideration of Commission actions. The statute does not allow the Commission to delegate authority to dispose of petitions for reconsideration of Commission-level actions, particularly not matters involving an application for review of prior rulings by a delegated authority.

7. The only reason certain functions may be delegated in the first instance is because Section 5(c)(1) authorizes such delegations. 47 U.S.C. § 155(c)(1). That authority is not unconditional—it includes express conditions and limitations, one of which is Section 5(c)(4) which provides that, after such an action has been taken by a delegated authority, an adversely affected party may seek review of that action by the Commission. Kay respectfully submits that Section 5(c)(4) of the Act requires that delegated authority actions be subject to an independent review, and that such requirement is not satisfied when the same delegated authority whose action is ostensibly being reviewed is directly and centrally involved in the review process.

8. This does not mean, of course, that the Commissioners themselves must perform all of the functions required for such actions. To be sure, reliance on staff to review, evaluate, summarize, report, and suggest to the Commission, with the Commissioner’s making the final call in good faith reliance on such staff work, is the only practical way, indeed the only possible way, the Commission could function. This common sense fact supports Kay’s interpretation of

Section 5(c)(4). Since a significant amount of delegation of functions is necessary as to all Commission actions, even those formally adopted in the name of the Commission, Congress obviously could not have intended for Section 5(c)(4) to permit the Commission to rely heavily on the delegated authority under review in processing applications for review. If this were so, there would be absolutely no distinction between applications for review of rulings by delegated authority as compared with any other Commission-level action. But that would render Section 5(c)(4) superfluous and therefore meaningless. The only possible reading of Section 5(c)(4) that makes any sense whatsoever is that Congress intended to extend to those aggrieved by delegated authority actions the statutory right to an independent agency-level review.

9. When a statute confers a specific right on participants in an administrative process, the satisfaction of that right demands more than meaningless formalities. For example, in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), the Supreme Court held that an applicant's right to a hearing before denial of an application must be a "meaningful" right. Thus, where the Commission unconditionally granted one of two mutually exclusive applications, a hearing set for the other application, while facially and formally within the scope of the requirements, was substantively meaningless. That procedure, declared the Court, rendered "the statutory right ... which Congress has accorded applicants ... an empty thing" 326 U.S. at 330. "[I]t may satisfy the strict letter of the law but certainly not its spirit." 326 U.S. at 331. The Court opined that simply going walking through technically correct procedural motions that had no effective substance "deprives the loser of the opportunity which Congress chose to give him." 326 U.S. at 333.

10. The policy enunciated in *Ashbacker* is equally applicable to Section 5(c)(4) right to have delegated authority actions reviewed by the Commission. Having an application for review evaluated and processed by the same delegated authority whose action is being reviewed renders the right an "empty thing." Passing the disposition under the Commissioners' noses for a

final blessing so that it may be issued in their name "may satisfy the strict letter of the law but certainly not its spirit." The procedure followed by the Commission "deprives [one filing an application for review] of the opportunity which Congress chose to give him," namely, the right to an independent Commission review of an adverse action by delegated authority.

WHEREFORE, it is respectfully requested that the Commission reconsider the *Memorandum Opinion and Order* (FCC 04-65; released March 23, 2004) and the *Report and Order* (FCC 03-45; released March 10, 2003) in the captioned proceeding.

Respectfully submitted on April 6, 2004,

JAMES A. KAY, JR.

By:

A handwritten signature in cursive script, reading "Robert J. Keller", written over a horizontal line.

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